Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Would a person reasonably question an appellate judge's impartiality, thus requiring an appellate judge to disqualify himself under 28 U.S.C. § 455(a), where there are numerous connections between him and the government's sole sentencing expert witness, to whom the appellate judge previously disqualified himself on two prior occasions?

2. Where an appellate court had already issued its mandate nine months before, was a motion to disqualify an appellate judge who concealed facts that were required to be immediately disclosed timely made?

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OPINIONS BELOW

The opinion of a panel of the United States Court of Appeals for the Seventh Circuit, with one judge dissenting, is reported at 159 F.3d 1020 (7th Cir. 1998) and is reproduced at Pet. App. B. The order of the Seventh Circuit denying rehearing and rehearing en banc, over the dissent of two judges, is reported at 159 F.3d 1020 (7th Cir. *reh'g en banc denied* January 26, 1999) and is reproduced at Pet. App. C. The order of the panel of the United States Court of Appeals for the Seventh Circuit dated November 10, 1999 denying the recall of the mandate is reproduced at Pet. App. D. The order of the appellate judge denying his disqualification dated November 10, 1999 is reproduced as Pet. App. E.

JURISDICTION

The final orders of the Seventh Circuit denying Petitioner's Motion to Recuse and Vacate Judgment (motion to disqualify) were entered on November 10, 1999. Petitioner's time to file a petition for writ of certiorari in this Court was due to expire on February 7, 2000. However, Petitioner filed an application for a 60 day extension of time to file his petition for writ of certiorari. On February 3, 2000, Justice John Paul Stevens granted Petitioner's request and extended his time to file until April 8, 2000. (See Pet. App. A.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the following provision of the United States Code:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

STATEMENT OF THE CASE

Robert R. Krilich, Sr. (Petitioner) was convicted in district court of conspiracy to violate the Racketeer Influenced and Corrupt Organization statute, 18 U.S.C. §1962(d), and fraud, 18 U.S.C. §1014. *United States v. Krilich*, Nos. 97-2721 & 97-2977, N.D. Ill. (1997). The district court held extensive sentencing hearings, in which one of the central issues involved the value of his net benefit as a result of his unlawful conduct. The government's sole expert witness who testified on this issue at the sentencing hearing was Daniel R. Fischel (Fischel). Subsequent to Fischel's testimony, the district court found that the net benefit to Petitioner was between five and ten million. The district court used that figure to impose a 14 level increase in Petitioner's offense level and then used the resulting offense level as the starting point for a seven level downward departure. A sentence was imposed that included 64 months incarceration.

Petitioner appealed the judgment of conviction, and the government cross-appealed the sentencing departure. Judge Frank H. Easterbrook (Judge Easterbrook) was the presiding judge of the Seventh Circuit Court of Appeals panel. In an opinion authored by Judge Easterbrook, in a partially

split decision with Judge Kenneth F. Ripple dissenting on the fraud conviction, the Seventh Circuit affirmed the convictions, but remanded the case for resentencing, strongly suggesting that an increased sentence was warranted. *United States v. Krilich,* 159 F.3d 1010 (1998). Fischel's testimony was not an issue on appeal. The mandate was issued on February 3, 1999. (Pet. App. E.) A petition for writ of certiorari was denied by this Court on October 1, 1999.

After the Seventh Circuit issued its mandate, Petitioner's counsel, who was primarily involved with Petitioner's civil income tax audit, learned that Judge Easterbrook has substantial connections to Fischel that lasted, at a minimum, over a twelve year period. (Pet. App. F, Affidavit of Philip W. Sandler) These connections are as follows.

First, Judge Easterbrook and Fischel have co-authored a book currently in print, entitled *The Economic Structure of Corporate Law* (Pet. App. G), and are also the co-authors of at least 17 law review articles, published in journals such as the *Harvard Law Review,* the *Yale Law Review,* and the *Journal of Law and Economics.* (Pet. App. H)

Second, Judge Easterbrook is a Senior Lecturer at the University of Chicago Law School and was so on October 27, 1998, the date the Seventh Circuit panel entered the judgment affirming Petitioner's conviction. Shortly after the Seventh Circuit panel entered its judgment, Fischel became Dean of the University of Chicago Law School. However, Fischel's appointment as Dean was announced publically on August 14, 1998 (Pet. App. I), and at the time the panel

issued its decision, it was well known, at least certainly among the faculty, that Fischel would soon become dean.[1]

After Fischel became dean, Judge Easterbrook remained on the Seventh Circuit panel and continued to retain his status as a Senior Lecturer at the law school. The Seventh Circuit panel subsequently ruled on a post-trial motion of Petitioner, in which it reversed the district court's granting of bond pending appeal and directed that another judge be assigned for resentencing. *United States v. Krilich,* 178 F.3d 859 (7th Cir. 1999). (Pet. App. K) The Seventh Circuit's indication that Petitioner's sentence should be increased was confirmed by this order, wherein it stated, "We cannot imagine any reason why a person whose convictions have been affirmed, and who faces at least another three years in prison, should be released while the district judge decides whether (and, if so, by how much) to increase the time remaining to be served." *United States v. Krilich,* 178 F.3d 859, 860 (7th Cir. 1999). (Pet. App. K, K-5)

It is Petitioner's understanding that Fischel plays a significant role in the determination of the salaries of the University of Chicago Law School faculty and the courses that they teach. During 1998, Judge Easterbrook earned $25,000.01 for his position as a Senior Lecturer at the University of Chicago Law School. (Pet. App. J)

Third, Judge Easterbrook and Fischel were former business "affiliates". (Pet. App. E, E-2). They were involved in Lexecon, Inc. (Lexecon), a consulting firm which specializes in the application of economics to a variety of legal and regulatory matters. Judge Easterbrook was a founding principal of Lexecon, although he severed his ties

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[1]As Judge Easterbrook acknowledged in his order, Fischel became dean on January 1, 1999. (Pet. App. E, E-8) This was premature to the originally scheduled date of July 1, 1999.

with Lexecon when he became a Seventh Circuit judge in 1985. Fischel is Executive Vice President of Lexecon and has been associated with Lexecon since the 1980s.

Additionally, on two separate occasions, Judge Easterbrook previously disqualified himself in two cases involving Fischel. (Pet. App. E, E-7) One was where a party challenged the accuracy of Fischel's testimony as an expert witness, and the other was where Fischel was a plaintiff. (Pet. App. E, E-7)

Accordingly, after learning of and carefully verifying certain information about Judge Easterbrook's and Fischel's relationship, petitioner filed as expeditiously as possible the motion to disqualify. Although there is little direct authority on the disqualification of federal appellate court judges,[2] Petitioner concluded that the motion must be presented to the judge that he is seeking to disqualify and the judge must make the decision whether to disqualify himself.[3] The motion to disqualify apparently should also be directed to the panel as a whole, since the panel has the power to vacate its judgment.

Two orders were subsequently entered by the Seventh Circuit on November 10, 1999 in response to Petitioner's motion to disqualify. In the first order, Judge Easterbrook determined that disqualification was not required. (Pet. App. E) Among other things, in this order, Judge Easterbrook acknowledged that he learned of Fischel's involvement in the case while the opinion was being drafted. However, he determined that no disqualification was required under these circumstances, primarily because Fischel's testimony was not an issue in dispute on appeal. In

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[2] See RICHARD E. FLAMM, *Judicial Disqualification Recusal and Disqualification of Judges*, § 28.2.1 (1996).

[3] See *Schurz Communications, Inc. v. F.C.C.*, 982 F.2d 1057 at 1059 (7th Cir. 1992).

the second order, based on Judge Easterbrook's decision not to disqualify himself and because the court found that petitioner's motion was not timely made, the Seventh Circuit panel refused to recall its mandate. (Pet. App. D)

In this petition, Petitioner now relies solely on 28 U.S.C. § 455(a). He previously focused on 28 U.S.C. § 455(b)(2) and secondarily focused on 28 U.S.C. § 455(a) in his motion to disqualify because his understanding of the facts reasonably led him to believe that 28 U.S.C. § 455(b)(2) was controlling in this matter. However, based on additional information Judge Easterbrook disclosed in his order, Petitioner no longer believes that 28 U.S.C. § 455(b)(2) applies. Accordingly, he is not raising it in this petition and will be only addressing 28 U.S.C. § 455(a) here.

Petitioner petitions the Supreme Court for writ of certiorari for three reasons. First, this case presents an important issue on the disqualification of federal appellate judges. Second, the issue presented appears to be one of first impression. Third, this is the only Court that can effectively review this matter.

REASONS FOR GRANTING THE WRIT

I. *A Person Would Reasonably Question an Appellate Judge's Impartiality, Thus Requiring an Appellate Judge to Disqualify Himself under 28 U.S.C. § 455(a), Where There Are Numerous Connections Between Him and the Government's Sole Sentencing Expert Witness, to Whom the Appellate Judge Previously Disqualified Himself on Two Prior Occasions.*

In this case, there are numerous connections between Judge Easterbrook and Fischel. In fact, so many exist between the two men that it becomes almost eerie — they

worked together, taught together at one of the most prestigious law schools in the country, wrote a book together, published at least 17 articles together in scholarly law journals, and were in business together at an economics consulting firm.

Although Judge Easterbrook stated in his order (Pet. App. E, E-8) that his salary is set by Congress under 5 U.S.C. App. 4 § 501(a)(1) and thus contends that his salary is not determined by Fischel as dean of the law school, this statute only sets a limit on how much outside earned income a government employee can earn. Thus, if Judge Easterbrook's salary was less than the limitation, Fischel could have a great influence in determining how much. Also, certainly Fischel is a big factor, if not the sole authority, in determining whether Judge Easterbrook teaches at all, and if he does teach, what courses he teaches. Standing alone, even without Judge Easterbrook's and Fischel's other numerous connections, the fact that Fischel plays a role in the determination of Judge Easterbrook's salary for teaching at the law school and what courses he teaches (if any) is significant and cannot be ignored.

Here, Fischel was the government's sole expert witness at the sentencing hearing in Petitioner's criminal district court case. When the case was on appeal to the Seventh Circuit, Judge Easterbrook, who in his own words in his order denying Petitioner's request for disqualification, admitted, "I did not learn that he [Fischel] had been a witness until late in the preparation of the opinion, when a law clerk checking the transcript mentioned that he had testified." (Pet. App. E, E-7).

A judge is not an adversary and must not only be, but must also appear to be, impartial to all parties. However, all of Judge Easterbrook's numerous connections to the government's sole expert sentencing witness brings into question

the appearance of partiality in this matter. The appearance of partiality is governed by 28 U.S.C. § 455(a). As this Court has stated, "As Chief Judge Clark of the Court of Appeals explained: "The goal of section 455(a) is to avoid even the appearance of partiality . . . " " *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988).

It is undisputed that Judge Easterbrook and Fischel had a close and interconnected relationship spanning at least twelve years. Under these circumstances, because of Judge Easterbrook's relationship with Fischel, Petitioner contends that a person might reasonably question Judge Easterbrook's impartiality in this matter, which would require him to disqualify himself. 28 U.S.C. § 455(a). Accordingly, since there was an appearance of partiality, Judge Easterbrook had a duty to disclose what he knew, and he then had a duty under § 455(a) to disqualify himself from the Seventh Circuit panel.

Petitioner agrees with Judge Easterbrook that there should not be a per se rule requiring disqualification where the judge and witness have written a scholarly publication together. (Pet. App. E, E-7) Moreover, Petitioner agrees that Judge Easterbrook believes that he was able to be impartial in this case because Fischel's expert witness testimony was not an issue on appeal.

However, this analysis misses the point. Petitioner acknowledges that standing alone, joint scholarly publication between an appellate judge and an expert witness does not per se merit the appellate judge's disqualification from a case. Additionally, the fact that the expert witness's testimony is not an issue on appeal is irrelevant. Instead, under § 455(a), it is the appearance of partiality to a reasonable person that determines whether a judge shall disqualify himself from a case. Since the connections between Judge Easterbrook and Fischel created an appearance of partiality

to a reasonable person, Judge Easterbrook was required to disqualify himself from this case.

The appearance of partiality would have been troubling enough if the judge had disclosed what he knew about the conflict, and then, after hearing from the parties, refused to disqualify himself. However, what is troublesome here is that although according to the judge he did not learn that Fischel had testified until "late in the preparation of the opinion," when the judge did learn of Fischel's involvement in the case, he did nothing and remained silent.

The controlling case, *Liljeberg,* 486 U.S. at 847, involved a motion in a civil case filed under Fed. R. Civ. P. 60(b)(6) to be relieved from a final judgment upon learning that a trial judge during his trial was, although not known to the judge or to any party involved in the litigation, a fiduciary of a university having a substantial financial interest in the outcome of the case. Although *Liljeberg* merely concerned a "busy" judge who "inadvertently overlook[ed]" a financial conflict involving a fiduciary in a civil case (*Liljeberg,* 486 U.S. at 862), the Court found it "quite inexcusable" (*Liljeberg,* 486 U.S. at 866) that the judge failed to recuse himself. It stated, "A full disclosure at that time would have completely removed any basis for questioning the judge's impartiality...by his silence, Judge Collins deprived respondent of a basis for making a timely motion and also deprived it of an issue on appeal."*Liljeberg,* 486 U.S. at 867. Accordingly, this Court vacated the civil judgment and remanded for a retrial to remedy the § 455(a) violation. *Liljeberg,* 486 U.S. at 868.

In denying Judge Easterbrook's disqualification, it is clearly evident that he and the Seventh Circuit have entirely ignored *Liljeberg.* However, the potential ramifications of this matter (if left uncured) are much more serious than *Liljeberg.* First, even though *Liljeberg* concerned a civil

case, this Court ordered vacatur. Vacatur is even more important in criminal cases, where like this one, the judge was aware of the conflict, but never disclosed it. There is no greater "risk of injustice" than in being sent to prison by an appellate judge tainted by actual or even an appearance of partiality.

Second, *Liljeberg* involved a "busy" judge who "inadvertently overlook[ed]" a disqualifying circumstance. *Liljeberg,* 486 U.S. at 862. In contrast, in this matter, Judge Easterbrook had actual knowledge of the conflict, yet remained silent about the circumstances, leaving it up to Petitioner's counsel to investigate and discover them on their own. Why Judge Easterbrook did nothing in this instance and did not disclose what he knew is not up to us to speculate. However, by his own admission in his order, Easterbrook disqualified himself twice before when Fischel was involved in a case. (Pet. App. E, E-7). It is much too thin a line of demarcation for Judge Easterbrook to determine in one instance to disqualify himself solely because Fischel's expert witness testimony was in dispute. Nevertheless, in this instance, because he contends that Fischel's expert witness testimony was not an issue on appeal, he denied disqualification. When Judge Easterbrook made that judgment, he acted as "a judge in his own case." *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 824 (1986).

Additionally, the appearance of partiality appears in both instances. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n of D.C. v. Pollak,* 343 U.S. 451, 467 (1952). Clearly, because there was an appearance of partiality in this matter, he should have disqualified himself immediately from participating in the Seventh Circuit's panel's decision.

Finally, not only did Judge Easterbrook write the opinion on the merits in this matter, but there was a dissenting opinion. This Court has found that a non-unanimous panel creates a basis for vacating an opinion in the recusal setting, especially where the judge who played the "leading role in the decision" was the author of the court's decision. The Court held this way because it determined that the vote of the judge being recused necessarily affected the outcome. *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. at 827-828 (1986).

As a practical matter, this Court is the only Court which can effectively review this matter. Because Judge Easterbrook has denied his disqualification, the next step could be to ask the Seventh Circuit for an *en banc* review. However, *en banc* reviews are very rarely granted. Moreover, an *en banc* review would be asking Judge Easterbrook's fellow appellate judges, with whom he collaborates on a routine and regular basis, to oversee and evaluate his determination refusing to disqualify himself. For obvious reasons, this would give the appearance that Petitioner was not receiving a fair *en banc* hearing.

Since Petitioner has shown that a reasonable person, knowing all the connections between Judge Easterbrook and Fischel, would harbor substantial doubts about the judge's impartiality, this Court is the proper forum in which to review this matter. Petitioner is requesting the relief that this Court order: (1) the recall of the Seventh Circuit's mandate; (2) Judge Easterbrook's disqualification; (3) the vacatur of the Seventh Circuit's judgment which affirmed Petitioner's convictions and vacated his sentence; and (4) that Petitioner be entitled to a new appellate hearing.

II. *Even Though the Seventh Circuit Had Issued its Mandate Nine Months Previously, The Motion to Disqualify Was Timely Made Because the Appellate Judge Concealed Facts That Were Required to Be Immediately Disclosed.*

In *Liljeberg*, the Court vacated a district court's final judgment, even though the motion to vacate was filed ten months after the Court of Appeals for the Fifth Circuit affirmed the district court's final judgment. In this matter, Petitioner filed his motion to disqualify twelve months after the Seventh Circuit affirmed Petitioner's convictions but vacated his sentence. However, the Seventh Circuit mandate was issued only nine months before the motion to disqualify was filed. Accordingly, the case at hand fits squarely within the time frame allowed by *Liljeberg*.

Nevertheless, the Seventh Circuit's order stated that one of the reasons that it could not recall its mandate was because Petitioner's motion to disqualify was not timely made. (Pet. App. D) This statement is apparently based on Judge Easterbrook's order. In his order, he argues that the facts on which Petitioner's motion to disqualify are premised are matters of public record and could have been learned by counsel (presumably by scouring all of the available public records) prior to the Seventh Circuit issuing its opinion.

However, Judge Easterbrook's rationale is both unreasonable and incorrect. Petitioner's counsel only learned about Judge Easterbrook's connections to Fischel by coincidence—when he was reviewing the district court's sentencing transcripts in preparation for Petitioner's resentencing, he learned that Fischel was the government's sole expert witness. Petitioner's counsel then happened to speak to a professional colleague, who had attended the University of Chicago Law School and who knew of Fischel and Lexecon. In the course of their conversation, Petitioner's counsel

further learned that one of the principal founders of Lexecon was Judge Easterbrook and that Fischel has been associated with Lexecon since the 1980s. From this point onward, certain connections were made and Petitioner's counsel thought it worthwhile to pursue the issue. If it were not for this sheer coincidence, Petitioner's counsel would not have uncovered Judge Easterbrook's connections to Fischel. This is not something that could have been readily attained simply by scouring the available public records.

In fact, many of these facts concerning the connections between Judge Easterbrook and Fischel were not even of public record, and thus Judge Easterbrook's statement is also incorrect. For instance, Lexecon is a privately held company and there is very limited public information available about it. Petitioner still does not have complete access to information about Judge Easterbrook and Fischel's connections to Lexecon, such as what their relationships exactly were beyond business "affiliates."

In any event, it is not up to counsel to conduct a fishing expedition by scouring public records in order to determine what judges have conflicts with what parties. It is also not a contest between a judge and counsel in order to determine what the other one knows. Finally, it is certainly a waste of time and money for counsel to have to investigate public records when a judge could simply disclose what he knows when there is an apparent conflict. Accordingly, when Judge Easterbrook learned that Fischel had testified as the government's expert witness, he had the affirmative duty to *timely* disclose his knowledge on the record.

In *Liljeberg*, the Court stated, "[I]n this case the entire delay is attributable to Judge Collins' inexcusable failure to disqualify himself on March 24, 1982; had he recused himself on March 24, or even disclosed Loyola's interest in the case at that time, the motion could have been made less

than 10 days after the entry of judgment." 486 U.S. at 869. Likewise, in this case, if Judge Easterbrook had timely disclosed what he knew, Petitioner's counsel would have filed the motion to disqualify immediately. Timely disclosure would have precipitated Petitioner's motion to disqualify the judge during the pendency of the Seventh Circuit's proceedings before rendering its decision affirming Petitioner's convictions.

However, after Petitioner's counsel ascertained the relevant facts concerning the judge's connections to the government's sole sentencing expert witness and filed the motion to disqualify, Judge Easterbrook and the Seventh Circuit denied Petitioner's motion to disqualify. In their denial, one of the reasons they use is that Petitioner's motion was not timely made.

Judge Easterbrook even argued in his order that "this motion must be denied for the most fundamental of reasons: there is no case pending in this court concerning Krilich." (Pet. App. E, E-1) Of course, had Judge Easterbrook disclosed what he knew when he learned of the conflict, Petitioner's counsel would have filed the motion to disqualify immediately and *accordingly, a case would have been pending concerning Petitioner before the Seventh Circuit panel.*

In its order denying the recall of the mandate, the Seventh Circuit stated that "a mandate may be recalled only in extraordinary situations, see *Calderon v. Thompson,* 523 U.S. 538, 550 (1998), of which this is not given the defendant's lengthy delay . . ." (Pet. App. D) That case held "the general rule to be that, where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeus corpus relief to a state prisoner, the court abuses its discretion unless it acts to

avoid a miscarriage of justice . . ." 523 U.S. at 558.[4] However, in this case, Petitioner cannot think of a graver miscarriage of justice—that of coming before a biased judge and then being incarcerated.

In fact, coming before a biased judge is so inherently unfair, it does not appear to be subject in a criminal case to harmless error review, except perhaps on the issue of the appropriate remedy. In *Neder v. United States*, 527 U.S. 1,7 (1999), the Court stated, "The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review . . . *Unlike such defects as the complete deprivation of counsel or trial before a biased judge*, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (emphasis added).

The Seventh Circuit panel, apparently adopting Judge Easterbrook's position, should not be permitted to use the holding in *Calderon* to deny a recall of its mandate. It should not be permitted to employ *Calderon's* holding in order to deny Petitioner a fair hearing before an impartial judge, when it was Judge Easterbrook who caused the "lengthy delay" in Petitioner's filing of the motion to disqualify, simply because he did not disclose what he already knew on the record. Finally, Judge Easterbrook should not

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[4]In that Supreme Court case, the movant filed under Fed. R. Civ. P. 60(b) for the Ninth Circuit Court of Appeals to recall its mandate in connection with a habeus corpus proceeding. The *Calderon* Court had no difficulties with the movant filing under 60(b). This is one example of an appellate court using this rule in a criminal context. However, in Judge Easterbrook's order, he inferred that Rule 60(b) does not apply here, stating that "Rule 60(b) concerns civil cases in the district court, while the matter at hand is a criminal case in the court of appeals . . ." Petitioner finds it ironic that the very case the Seventh Circuit cited as one of the reasons in order to deny Petitioner's motion to disqualify in fact supports his case.

be excused because he proceeded to sit as presiding judge of Petitioner's Seventh Circuit panel and author its opinion—all the while failing to disclose the potential (and in fact, actual) conflict between himself and his former business affiliate, colleague, and writing partner.

III. *Failure to Grant Petitioner's Petition for Writ of Certiorari Will Risk Severe Injustice to Petitioner, To Parties in Future Cases, and Will Undermine the Public's Confidence in the Judiciary.*

In determining whether a judgment should be vacated for a violation of § 455(a), *Liljeberg* sets forth a three part test: "Consider [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Liljeberg,* 486 U.S. at 864 (numbering added).

Liljeberg seems to imply that meeting only one of these elements may alone be, if warranted, sufficient grounds for vacating a judgment. Nonetheless, all three of *Liljeberg's* grounds for vacatur are satisfied here.

A. *The Risk of Injustice to Petitioner Substantially Outweighs the Risk to the Government.*

First, in this case, the fact that the injustice to Petitioner substantially outweighs any risk of injustice to the government is clear. It is Petitioner who must bear the entire cost of Judge Easterbrook's § 455(a) violation. As the result of the judge's violation of § 455(a), the risk of injustice has been transformed into the absolute reality of a miscarriage of justice because Petitioner has been deprived of his liberty. The price to Petitioner in this case is beyond measure.

In contrast, the risk of injustice to the government is, at best, minimal. Petitioner is not seeking a new trial in district court, so the government will not be inconvenienced in terms of substantial additional expenses and time it would have to invest in Petitioner's case. The only repercussions to the government if Petitioner's relief is granted is that there will be a new appellate hearing, which of course the government has already briefed. Accordingly, the risk of injustice to the government here is minimal, if any.

Consequently, when the risk of injustice is balanced between Petitioner and the government, it is clear that it is Petitioner who now suffers the injustice, and if Petitioner's relief is granted, justice will be served, while the government will not be inconvenienced.

Moreover, the appearance of justice will be satisfied as well. In enumerating its three part test, *Liljeberg* endorsed an earlier decision, which stated that "[w]e must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' " *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted).

B. *The Denial of Petitioner's Requested Relief Will Produce Injustice in Other Cases.*

Regarding the second element of the three-part test, the risk that the denial of relief will produce injustice in other cases, the *Liljeberg* Court stated, "[P]roviding relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Liljeberg*, 486 U.S. at 868.

Here, there is a substantial risk that the denial of relief in this case will produce injustice in other cases, since "these

facts create precisely the kind of appearance of impropriety that 455(a) was intended to prevent." *Liljeberg*, 486 U.S. at 867. If the relief that Petitioner requests is denied by the Court, Petitioner can think of a no more serious outcome. Otherwise, in the future, if judges unilaterally determine that the conflict is not worth disclosing on the record because they believe no disqualification is warranted, judges will have no incentive to disclose their knowledge. In fact, what happened here encourages judges to single-handedly evaluate the facts and circumstances and reach their own determination whether or not to disqualify themselves—all without ever having to communicate what they knew. If Petitioner's requested relief is denied, then this potential outcome in itself produces a high risk of injustice occurring in other cases.

C. *Denying Petitioner's Requested Relief Will Risk Undermining the Public's Confidence in the Judicial Process.*

Liljeberg stated that "the very purpose of 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865. Here, because there is the appearance of partiality and even actual partiality on the part of Judge Easterbrook, not granting Petitioner relief will risk undermining the public's confidence in the judicial process. If the public knows that judges are now permitted to unilaterally determine when they disclose a potential conflict, if at all, while being able to deny their disqualification even when there is the appearance of partiality, then the public will not be able to maintain its confidence in the judicial system.

Finally, the Seventh Circuit order denying Judge Easterbrook's disqualification trivializes the importance of maintaining the highest standard of judicial ethics by giving

full faith and credit to judgments rendered by a federal appellate judge who concealed an apparent (and actual) conflict. Certainly, if the public knows this, then their confidence in the judiciary will be swiftly eroded. Accordingly, the only way to ensure the fair administration of justice (in appearance and in actuality) and to restore confidence in the judiciary is to hear Petitioner's Petition for Writ of Certiorari and to grant Petitioner's requested relief.

CONCLUSION

The Court cannot allow Judge Easterbrook to violate § 455(a), because the repercussions are far too severe to Petitioner, to parties in future cases, and to the public's confidence in the judiciary. For the foregoing reasons, Petitioner respectfully requests that his Petition For Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

PHILIP W. SANDLER
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Attorneys for Petitioner

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 3, 2000

Mr. Phillip W. Sandler
Sandler & Associates
111 W. Washington St., #1435
Chicago, IL 60602

Re: Robert R. Krilich
v. United States
Application No. 99A608

Dear Mr. Sandler:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on February 3, 2000, extended the time to and including April 8, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Gail B. Johnson
Assistant Clerk

APPENDIX B
159 F.3d 1020

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Robert R. KRILICH, Defendant-Appellant, Cross-Appellee.

Nos. 97-2721, 97-2977.

United States Court of Appeals, Seventh Circuit.

Argued April 7, 1998.
Decided Oct. 27, 1998.

Defendant was convicted in the United States District Court for the Northern District of Illinois, John F. Grady, J., of fraud and conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO). Defendant appealed, and the United States cross-appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) defendant waived right to prevent admission of statements he made in bargaining proffer; (2) for purposes of RICO charge, whether payment made to city officials was a true bribe, or whether it was merely "gratuitous" payment, was for the jury; (3) charging in indictment that act of bribery occurred on one date, and proving at trial that it occurred at different time, was classic variance, and was harmless; (4) defendant's statements, made to enable him to tap bond proceedings held in trust by banks, were within reach of statute prohibiting making false statement or report to influence action of financial institution; (5) defendant failed to show plain error in jury instructions, which purportedly improperly removed some issues from jury's considera-

tion; and (6) though downward departure could potentially be justified under application note authorizing departure if sentencing guideline table overstated seriousness of defendant's conduct, district court's reasoning was inadequate to support seven-level departure.

Affirmed in part, vacated in part, and remanded.

Ripple, Circuit Judge, filed opinion concurring in part and dissenting in part.

Joel D. Bertocchi (argued), Stephen Heinze, Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Thomas D. Decker, Decker & Associates, Dennis A. Berkson, Lawrence C. Marshall (argued), Northwestern University Legal Clinic, Marc W. Martin, Chicago, IL, Herbert J. Miller, Jr., Nathan Lewin (argued), Stephen L. Braga, Paul F. Enzinna, Miller, Cassidy, Larroca & Lewin, Washington, DC, for Robert R. Krilich.

Jeffrey Urdangen, Chicago, IL, for Amicus Curiae Illinois Attorneys for Criminal Justice.

Carol A. Brook, Office of the Federal Defender Program, Chicago, IL, for Amicus Curiae Federal Defenders of the Northern, Central and Southern Districts of Illinois.

Before EASTERBROOK, RIPPLE, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

A golfer's dream came true for Andy Sarallo. On June 19, 1985, Andy lined up at the ninth tee at Country Lakes Country Club and struck the ball; an observer on the ninth green pulled Andy's ball out of the hole. Andy's foursome jumped up and down and shouted for joy. Because the ninth hole at Country Lakes was the subject of a hole-

in-one contest that day, Andy had just won his choice of a 1931 Cadillac or a check for $40,000!

A hole-in-one is quite a thrill because it happens so infrequently—perhaps one chance in 40,000, rarer than a 300 game in bowling. But Andy's chances were close to 100%, because his father was mayor of Oakbrook Terrace, Illinois, and the mayor's support was needed for a bond offering to finance an apartment complex to be built by Robert Krilich—who sponsored the contest, pulled the ball out of the hole, and became the defendant in this criminal case. Krilich and Mayor Sarallo agreed to use the golf tournament as the vehicle for a payoff. Krilich palmed one of Andy's golf balls, put his hand into the cup, and displayed the ball. Delivering the bribe in this way enabled Krilich to shift the cost to the National Hole-In-One Association, which provided insurance. Thus fraud and bribery were coupled. Krilich admitted this scheme in a proffer to the United States Attorney, and he also conceded bribing the mayor to alter the zoning of some land and orchestrating the extraction of funds from municipal bond offerings. The bonds—Industrial Revenue Bonds, interest on which is not taxable to the investors—were sold to finance Krilich's developments. Because the bonds were limited to specific projects (tax exemption depended on that link), the funds were placed in trust, and the trustee banks were to release the money only to reimburse expenses associated with the projects. Preferring to use the money elsewhere, such as for payments on his yacht, Krilich instructed vendors to falsify their invoices and had those bogus invoices sent to the banks for payment out of the trust accounts.

Krilich was convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1962(d) (RICO), and a fraud statute, 18 U.S.C. § 1014. Krilich maintains on appeal that the district

court erred by permitting the prosecutor to use some of the proffer's contents at his trial, that 18 U.S.C. § 1014 does not apply to his conduct, that the instructions improperly removed some issues from the jury's consideration, and that he is not criminally liable for other reasons. The United States argues in a cross-appeal that Krilich's 64-month prison sentence is too low.

I

[1, 2] Statements made during plea negotiations are inadmissible, Fed.R.Evid. 410; Fed.R.Crim.P. 11(e)(6), but a defendant may waive the right to prevent their use. *United States v. Mezzanatto,* 513 U.S. 196, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995). The agreement Krilich signed contains a conditional waiver:

> [S]hould [Krilich] subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer, nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury.

By authorizing the prosecutor to use his statements if he should contradict himself, Krilich made his representations more credible and thus strengthened his hand in negotiations. See *Mezzanatto*, 513 U.S. at 207, 115 S.Ct. 797; Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 Cardozo L. Rev. 1541 (1998). A prosecutor may be reluctant to negotiate; what has the defendant to offer? A statement that shows how the defendant's aid could assist the prosecutor in other cases (or lead to the appropriate sentence in this one) may get negotiations under way and set the stage for a favorable bargain. But a prosecutor needs assurance that the defendant is being candid. A conditional waiver of the kind Krilich signed tends to keep the defen-

dant honest, which makes the proffer device more useful to the both sides. For this strategy to work the conditional waiver must be enforceable; its effect depends on making deceit *costly*. We therefore reject the argument that waivers should be construed against prosecutors; that might help Krilich today but would hinder bargaining for other defendants tomorrow. We give this waiver neither a stingy reading nor a generous one, but a natural reading, which leaves the parties in control through their choice of language.

[3] This agreement allowed the prosecutor to use the proffer as evidence if Krilich were to "testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer". Introduction of the statements thus was proper if either his testimony, see *United States v. Goodapple,* 958 F.2d 1402, 1409 (7th Cir.1992), or evidence that he presented through the testimony of others, see *United States v. Richardson,* 130 F.3d 765, 778 (7th Cir.1997); *United States v. Dortch,* 5 F.3d 1056, 1068 (7th Cir.1993), contradicted the proffer. Because Krilich did not testify, only the second clause is at issue. Krilich wants us to limit this clause to evidence presented through his own witnesses; evidence obtained by cross-examination of the prosecution's witnesses does not count, he insists. But that would be an unnatural reading of the language. Evidence is evidence, whether it comes out on direct or cross-examination. One can "otherwise present" a position through arguments of counsel alone, so it is easy to see how a position can be "presented" by evidence developed on cross-examination and elaborated by counsel. When the prosecution's witnesses are inclined to accommodate the defense, as many were in this case, developing one's position through cross-examination is especially attractive.

The prosecutor's position about the effect of the language is as unrealistic as Krilich's. According to the prose-

cutor, putting on *any* defense permits the United States to introduce the statements. A plea of not guilty followed by passivity at trial is about all the defense can do, the prosecutor contends—though, when pressed at oral argument, the prosecutor allowed that Krilich could have avoided introduction of the statements if he had limited his cross-examination to "the credibility, weight and sufficiency of the government's evidence in ways that were extrinsic to the facts of the case". On this understanding, asking a witness on cross-examination whether he had been convicted of perjury would be "extrinsic to the facts of the case", but asking the witness whether he had been in a position to see what happened at the ninth green on June 19 would open the door to the use of the proffer. Such a distinction makes sense of neither the language in the contract nor the reason why the waiver was *conditional*. The prosecutor wanted to give Krilich an incentive to tell the truth; Krilich wanted assurance that he could defend himself at trial if bargaining collapsed (for otherwise he was delivering himself into the prosecutor's hands); conditioning the use of the proffer statements on the presentation of a position "inconsistent with the proffer" does both of those things only if the judge must find genuine inconsistency before allowing use of the statements.

[4] Impeachment of a witness need not be "contrary to" or "inconsistent with" a defendant's admission of guilt in a bargaining proffer. To take a simple example, the statements "I faked the hole-in-one on the ninth hole" (Krilich, in the proffer") and "I did not see Krilich palm a golf ball at the ninth hole on June 19" (a witness, on cross-examination) are not inconsistent. Investigation via cross-examination of witnesses' ability (or willingness) to observe and recount the facts they claim to have observed therefore could not have justified introduction of the proffer state-

ments. Millions of people who live in Illinois did not see what happened at the ninth green on June 19; others who did see what happened may have had reasons to misrepresent what they saw; proof that a given person who took the stand at trial was in the set of non-observers (or liars) is not "inconsistent" with the proffer. Statements are inconsistent only if the truth of one implies the falsity of the other. The statements "Krilich pulled a palmed ball from the cup at the ninth hole" and "Krilich wasn't at the ninth hole when Andy hit his shot" are inconsistent because the former statement cannot be true if the latter is. This appeal turns on whether Krilich elicited such inconsistent testimony. The district judge concluded that he had, and that assessment is not clearly erroneous.

[5, 6] Several witnesses testified, in response to questions from Krilich's attorney, that the ninth hole at Country Lakes Country Club is close to the clubhouse and easily observed. Krilich wanted the jury to infer that no one would attempt to fake a hole-in-one there; that implication is inconsistent with the proffer. Defense counsel got two witnesses to say that they were at the ninth hole when Andy hit the shot but didn't think that Krilich was at the ninth hole then. This line of cross-examination was not designed to cast doubt on the witnesses' ability to see clearly or suggest that they are not trustworthy. Their testimony implied that Krilich did not fake the hole-in-one, contrary to what he admitted in his proffer. Similarly, in response to evidence that Krilich paid a bribe to obtain favorable zoning, his lawyer elicited testimony on cross-examination that no bribe was required because the city attorney thought the new zoning to be correct. Counsel likewise led witnesses to testify that the procedures followed for altering the zoning were not exceptional. Krilich's attorney also had the vice president of his company testify that he was not aware of

any bribes paid to *any* public official in connection with *any* project. The implication was that if someone so close to Krilich (and the projects) was unaware of bribes, there must not have been any. These statements go well beyond casting doubt on the prosecutor's evidence; they advance a position inconsistent with the proffer—or so the trial judge sensibly could conclude.

[7, 8] Krilich insists that if the conditional waiver means what we think it means, then it is unenforceable because involuntary. *Mezzanatto* says that waivers of the plea-statement rules are unenforceable if given "unknowingly or involuntarily" (513 U.S. at 210, 115 S.Ct. 797), but this is a far cry from saying that waivers mean whatever the defendants say they understood them to mean; no party to a contract has Humpty Dumpty's power over language either directly or through the gambit that unanticipated consequences render the agreement "involuntary." A waiver is voluntary in the absence of coercion, *Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *United States v. Brooks,* 125 F.3d 484, 492 (7th Cir.1997), and is knowing if made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). Krilich does not contend that his assent was coerced and offers no support for a conclusion that he didn't understand the rights that Rules 410 and 11(c)(6) confer. A defendant's understanding of the *consequences* of his waiver need not be perfect; it was Krilich's understanding of the rights being relinquished, not of all possible repercussions of relinquishing them, that made his waiver knowing. See *Colorado v. Spring,* 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987).

II

[9] One of the racketeering acts supporting Krilich's RICO conviction is a bribe of Nicholae Ionescu, Zoning Administrator and City Engineer of Oakbrook Terrace. Facing troubles with federal environmental authorities, Krilich asked Ionescu to supply an affidavit stating that development should be allowed to continue. Ionescu signed the affidavit and that afternoon met with Krilich at a restaurant, where without saying a word Krilich passed Ionescu an envelope containing $300. Krilich contends that a "gratuitous after-the-fact payment" is insufficient to prove bribery in Illinois, whose law controls on this question.

[10] Illinois does not treat payment before-the-fact as an element of bribery. See, e.g., *People v. Wright,* 105 Ill.App.3d 187, 61 Ill.Dec. 89, 434 N.E.2d 2G (2d Dist. 1982). A corporation that pays employees at the end of the workweek instead of at the beginning does not give gifts every Friday. Thus Krilich must be arguing that, because the payment was gratuitous, it could not be a bribe. That's a tautology, but *whether* a payment was "gratuitous" is a question of fact, rightly left to the jury. Krilich believes that the prosecutor adduced insufficient evidence of illicit intent behind the payment. But a reasonable jury could infer that this was a bribe—indeed, that Ionescu was on Krilich's payroll, so often had he been bribed before. The lack of *any* comment during the payoff is strong evidence that this payment was expected (for Ionescu's part) and offered as compensation for the affidavit (for Krilich's).

III

[11] The indictment charges that Sarallo solicited the hole-in-one bribe in April 1985. At trial, however, the prosecution elicited testimony from Terry Pearson, Krilich's

bagman, that the bribe was solicited in the months preceding April 1984. Everyone agrees that the hole-in-one bribe was in exchange for Sarallo's support in an April 1984 vote regarding the Oakbrook Terrace bond issue, so the date in the indictment is a blunder. Citing *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), Krilich argues that the prosecutor, by arguing the new date at trial, constructively amended the indictment in violation of the grand jury clause of the fifth amendment. But charging that an act occurred on one date and proving that it occurred at a different time is a classic variance, which does not change the nature of the crime alleged. *United States v. Nicosia,* 638 F.2d 970, 976 (7th Cir.1980). Compare *Stirone* with *United States v. Miller,* 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). Cases such as *United States v. Willoughby,* 27 F.3d 263, 265-66 (7th Cir.1994), like *Stirone* itself, involved the substitution of one criminal offense for another; a change of dates does not (the date of a crime is not an element of the offense). Krilich has not argued that the difference between the allegations and the proof prejudiced his ability to defend himself; variance here was harmless. *United States v. Cina,* 699 F.2d 853, 858-59 (7th Cir.1983).

IV

[12] Krilich was convicted of fourteen counts of violating 18 U.S.C. § 1014:

> **Loan and credit applications generally; renewals and discounts; crop insurance** Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting

through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 U.S.C. § 3101(1) and (3)]), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon an application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

Krilich's agents made the false statements so that he could tap bond proceeds held in trust by banks. He argues that this

provision applies only to statements made to obtain loans or other extensions of credit; because the withdrawals of the trust funds were not lending transactions, the statute was not violated, he submits. *United States v. Devoll,* 39 F.3d 575, 579-80 (5th Cir.1994), supports this contention, but this court and at least two more have applied § 1014 to transactions other than loans. *United States v. Tucker,* 773 F.2d 136, 139 (7th Cir.1985); *United States v. Yung Soo Yoo,* S33 F.2d 488 (3d Cir.1987); *United States v. Bonnette,* 781 F.2d 357, 366 (4th Cir.1986). *Tucker* affirmed a conviction of a con artist who forged shipping documents that led a bank to permit a draw against a letter of credit; so far as the opinion reveals, the letter of credit was fully funded and the only loser was the would-be purchaser. See also *United States v. Erskine,* 588 F.2d 721, 722 (9th Cir.1978) (Kennedy, J.) (§ 1014 applies to "a loan or one of the other transactions listed in the statute"). Krilich ignores this adverse precedent but apparently wants us to overrule *Tucker* in order to follow *Devoll.*

[13] Krilich faces an uphill battle. The text of the statute is straightforward and broad: it applies to "any" statement made for the purpose of influencing in "any" way the action of "any" of the covered institutions in "any" application. Krilich caused vendors to make false statements in applications presented to federally insured banks. To overcome § 1014's breadth Krilich relies on the title of the section, specifically the phrase "[l]oan and credit applications generally". The title, according to Krilich, informs the reader that the statute applies only to applications for loans or credit, and not to applications for funds held in trust. Yet if the title limits the statute's breadth, then Krilich might as well argue that because his statements were not made in connection with "crop insurance" the statute does not apply to them. Although a statute's title can inform the under-

standing of ambiguous text, it does not "limit the plain meaning of the text". *Pennsylvania Department of Corrections v. Yeskey,* U.S. , , 118 S.Ct, 1952, 1956, 1141 L.Ed.2d 215 (1998) (quoting from *Trainmen v. Baltimore & Ohio R.R.,* 331 U.S. 519, 528, 67 S.Ct, 1387, 91 L.Ed. 1646 (1947)). This text is not ambiguous, and only last year the Supreme Court reminded us not to add elements to § 1014. See *United States v. Wells,* 519 U.S. 482, 117 S.Ct. 921, 927, 137 L.Ed.2d 107 (1997) (materiality is not mentioned in § 1014, a "natural reading" of § 1014 would not make it an element, and therefore the prosecutor need not establish that the false statement is material to the financial institution's decision).

The drumbeat of "any" in § 1014 is not the only reason to conclude that it applies to transactions other than loans (and crop insurance). It deals with misstatements to "a Federal Reserve Bank, . . . the Office of Thrift Supervision, . . . the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, [and] the National Credit Union Administration Board", among others. None of these institutions makes loans (or underwrites crop insurance); and although one could quibble with this assessment by saying that the discount activities of the Federal Reserve and some of the operations of the FDIC (or RTC) as receiver of failed financial institutions involve loans, the Office of Thrift Supervision and other listed bodies are just regulators. If their inclusion in the statute is to have meaning, then § 1014 *must* cover statements that are not designed to influence an extension of credit—indeed, must cover statements that have nothing to do with the payment of money. Krilich's statements, like those in *Tucker,* were designed to induce a financial institution to disburse money, so they are within the reach of § 1014. Tie-

breakers and doubt resolvers such as the Rule of Lenity therefore do not help Krilich: his problem is not that the statute is ambiguous, but that it is comprehensive. Legislative history likewise is of no assistance, given the Supreme Court's view that legislative history may not be employed to limit the effect of a broadly worded statute. *Brogan v. United States,* 522 U.S. 398, , 118 S.Ct. 805, 810-11, 139 L.Ed.2d 830 (1998).

Williams v. United States, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982), on which Krilich relies so heavily, does not support his thesis. *Williams* posed the question whether a no-funds check is a "false statement" for the purposes of § 1014; the Court concluded that the only "statement" made by a check is an instruction to the drawee bank to pay, and that the implication that funds are available for that purpose is not covered by § 1014 because a misleading implication differs from a false statement. Cf. *Bronston v. United States,* 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). Krilich can find no comfort in this conclusion; he induced vendors to make literally false statements. Only by departing from the holding of *Wells* that courts must not restrict the scope of § 1014 could we accept Krilich's understanding of the statute.

[14] This does not conclude the appeal on the § 1014 counts, because the district judge instructed the jury that the falsified invoices and requisitions "were 'applications' within the meaning of this statute and that the funds withdrawn from the trust accounts pursuant to authorizations by the banks were 'advances' within the meaning of the statute." Krilich argues that this instruction amounted to summary judgment on the "application or advance" element of § 1014, violating the sixth amendment by depriving him of a jury trial on all elements of the offense. See *Sullivan v. Louisiana,* 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d

182 (1993); *United States v. Ladish Malting Co.,* 135 F.3d 484, 490 (7th Cir.1998).

[15] Krilich objected to this instruction but did not give a reason. Under Fed.R.Crim.P. 30 reasons are essential, so the prosecutor contends that our role is limited to a search for plain error. Fed.R.Crim.P. 52(b). Krilich responds that the reasons were "self-evident", making recitation otiose, and adds that the district judge must have been aware of *United States v. Gaudin,* 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), which demonstrates that issues such as these are for juries to decide. Yet it is exactly to avoid speculation about what judges must or should have known that Rule 30 calls for litigants to explain themselves. A citation to *Gaudin* could have led the district judge to withdraw the instruction and avoid this error. Rule 30 does not require elaborate or detailed argument, see *United States v. O'Neill,* 116 F.3d 245, 247 (7th Cir.1997), but counsel must say enough to inform the judge *why* the instruction is wrong, so that errors can be prevented. *United States v. Roth,* 860 F.2d 1382, 1390 (7th Cir.1988).

[16, 17] An instruction that removes from the jury's purview questions that under *Gaudin* the sixth amendment commits to its decision is plain error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Johnson v. United States,* 520 U.S. 461, 117 S.Ct. 1544, 1550, 137 L.Ed.2d 718 (1997), quoting from *United States v. Olano,* 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). This showing Krilich does not even attempt to make. He does not say that he denied at trial that the requisitions were "applications", or the disbursements "advances"; the evidence that they were is overwhelming, and no jury could have found otherwise, so Rule 52(b) precludes reversal on account of this error.

V

[18] The United States cross-appeals, contending that the district judge applied the Sentencing Guidelines improperly. Because the underlying conduct for the RICO conviction was bribery, the relevant guideline is § 2C1.1(b)(2)(A):

> If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

After finding that Krilich's benefit was between $5 million and $10 million, the district court used the table at § 2F1.1(b)(1) to calculate an increase of 14 offense levels but immediately departed downward 7 levels.

Application Note 7(b) to § 2F1.1 provides: "Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted." The judge concluded that a mechanical application of the table significantly overstates the seriousness of Krilich's conduct. According to the United States, the Guidelines do not permit a departure for this reason. Although § 2C1.1 refers to the *table* in § 2F1.1, it does not adopt the application notes to that table, the prosecutor insists.

Many guidelines incorporate the table in §2F1.1, and this is not the first time we have had to decide whether judges may refer to the application notes that explain (or limit) the operation of that table. But the last time the subject came up, the parties' positions were reversed: the defendant argued that § 2F1.1's table should be applied without reference to its application notes, and the United States contended that reference to the notes was necessary,

indeed obligatory. We held that the table is far from self-explanatory and that reference to its application notes is essential to its accurate application. *United States v. Kim Tae Sung*, 51 F.3d 92, 94-95 (7th Cir.1995). What's sauce for the goose is sauce for the gander. The district judge was entitled to accept the invitation extended by Application Note 7(b). See *Koon v. United States,* 518 U.S. 81, 94-96, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

[19] Any departure, even one based on factors identified by the Sentencing Commission as appropriate, must be carefully considered and explained. We have considerable doubt that the district court's departure satisfies this requirement. Application Note 7(b) authorizes a downward departure if the table overstates the seriousness of the defendant's conduct. But the district judge did not directly address this issue; instead the judge believed that the Sentencing Commission should have made the sentence depend on the loss to third parties rather than the gain to the perpetrator, and it was the lack of a "loss" table that led him to cut in half the number of levels produced by the "gain" table. According to the judge, Krilich's scheme produced a profit for him without an offsetting loss to anyone else, which justified a reduced sentence. Add the gain to the loss and divide by two to get the right result, the judge reasoned.

There is much to be said, as a matter of first principles, for using loss rather than gain as the starting point in determining sanctions. See Richard A. Posner, *Economic Analysis of Law* § 7.2 (5th ed.1998); Gary S. Becker, *Crime and Punishment: An Economic Approach,* 76 J. Pol. Econ. 169 (1968). Sometimes the Guidelines follow this approach. The table in § 2F1.1 *is* a loss table, designed for fraud cases (so the touchstone is the victim's loss rather than the offender's gain). But other guidelines, of which § 2C1.1 is an example, use additional benchmarks; § 2C1.1

requires the judge to use the *greatest* of payment, loss, or benefit, according to the monetary categories in the § 2F1.1 table. Because departure is proper only when a case presents a circumstance "of a kind or to a degree not adequately considered by the Sentencing Commission", 18 U.S.C. § 3553(b), a district court's disagreement with the Commission's resolution of an issue it considered is never an appropriate ground for departure. *Koon*, 518 U.S. at 106, 116 S.Ct. 2035.

The district judge's approach is questionable in implementation in addition to being incompatible with the Guidelines. Because the Commission's tables are log-linear (and thus diminish the effect of large numbers), the approach of adding gain to loss and dividing by two should have been applied to the dollar figures, not to the offense level. Suppose the gain was $9 million and the loss zero. The average would be $4.5 million, which under the table in § 2F1.1 would produce a 13-level increase (only one fewer than the 14-level increase appropriate for the $5 million to $10 million range). Cutting the number of *levels* in half, to seven, gave Krilich the same sentence that would have been meted out to an offender whose gain (or loss caused) was between $120,000 and $200,000. The district judge never explained why Krilich is no more culpable than a person whose crime produces a gain or loss in that range.

What is more, we doubt the premise that Krilich committed a victimless crime. The district judge emphasized that Krilich did not obtain money from the municipalities but simply capitalized on their ability to facilitate investments whose return would not be taxed to the bondholders. That may be so, but the United States Treasury lost approximately a dollar in tax revenue for every dollar Krilich saved. The benefit to Krilich was a reduction in the rate of interest he had to pay to borrow the money for his projects.

If interest on the bonds had been taxable, he would have had to pay more to make the investors indifferent between purchasing the taxable instruments and investing in tax-free instruments of equivalent risk, such as municipal bonds. The correspondence between Krilich's gain and loss to the public fisc is not exact, because some investors (pension trusts, for example) do not pay immediate taxes on any of their investments — though their beneficiaries will pay taxes when they receive their pensions. Calculating the actual loss in tax revenues from providing investors with a tax shield that the law does not allow is quite complex, and we do not suggest that a district court is required to undertake the calculation, but the existence of a substantial tax loss is undeniable. The difficulty of determining loss in bribery cases is one reason why the Commission could sensibly decide to focus on perpetrators' gains, which often can be ascertained more readily.

[20] So although a departure might be justified under Application Note 7(b), the district court's reasoning is inadequate to support a seven-level departure. Before deciding on remand whether the table in § 2F1.1 "significantly . . . overstates the seriousness of the defendant's conduct", the district court must recalculate Krilich's gain. Having decided to take a meat axe to the table in § 2F1.1 — indeed, having announced even before hearing evidence about Krilich's gain that he would do this — the judge saw little reason to decide whether the gain exceeded $10 million, as the prosecution contended. Such a finding would add one extra level, but the judge was determined to allow no more than seven from the table, and whether the calculation was $14 - 7 = 7$ or $15 - 8 = 7$ did not matter. Because the starting point does matter, it must be ascertained with more confidence than the judge expressed in his pronouncement

that the $5 million to $10 million range was as good a starting point as any.

[21, 22] On remand the judge should give no weight to the second factor that influenced the departure: the disparity between Krilich's presumptive sentence under § 2F1.1 and Mayor Sarallo's actual sentence, and between Krilich's sentence and those sentences handed out in the Operation Greylord prosecutions of judicial corruption during the 1980s. Consideration of variance among the sentences of different offenders is permissible only when the disparity is "unjustified". *United States v. Meza*, 127 F.3d 545, 549-50 (7th Cir.1997). Differences that occur as a result of a proper application of the Guidelines in light of the prosecutor's charging decisions are never "unjustified" as *Meza* defines that term. Krilich has not argued that the Guidelines were incorrectly applied in either his or Sarallo's case. In exchange for Sarallo's cooperation, the prosecutor refrained from charging his most serious offenses. That decision greatly reduced Sarallo's sentence but should not redound to the benefit of the uncooperative Krilich. As for the difference between Krilich's sentence and the penalties imposed more than 10 years ago on state judges who received bribes: if pre-Guidelines sentences under a regime allowing great judicial discretion (and thus great disparity) were allowed to influence the current sentencing mechanism, the Guidelines would be defeated. Sentences today depend on the Guidelines, not on how pre-Guideline cases were handled. *United States v. Fonner*, 920 F.2d 1830, 1335 (7th Cir.1990).

The convictions are affirmed. The judgment is vacated, and the case is remanded for resentencing.

RIPPLE, Circuit Judge, concurring in part and dissenting in part.

I agree with the opinion of Chief Judge Politz in *United States v. Devoll,* 39 F.3d 575, 579 (5th Cir.1994), that 18 U.S.C. § 1014 applies only to lending activities by the financial institutions protected by the statute. Contrary to the implication in the majority opinion, *Devoll* does not stand alone and in opposition to the positions of several other circuits. Notably, each of the cases that has applied the statute has dealt with a situation involving the protected bank's function of extending credit. See *United States v. Yung Soo Yoo,* 833 F.2d 488, 489 (3d Cir.1987) (defendant convicted of "making false statements to a federally insured bank in order to influence its action on a commitment"); *United States v. Bonnette,* 781 F.2d 357, 359 (4th Cir.1986) (crediting defendant's account on basis of "sight draft" with auto title attached); *United States v. Tucker,* 773 F.2d 136, 139 (7th Cir.1985) (whether a letter of credit is within the scope of the statute); *cf. United States v. Erskine,* 588 F.2d 721, 722 (9th Cir.1978) (holding that the "elements of a section 1014 violation include these requisite mental states; knowledge of falsity, and the intent to influence action by the financial institution concerning a loan or one of the other transactions listed in the statute"). All of these cases are in harmony with the Supreme Court's explicit determination that the statute was designed to provide "penalties for making false statements or reports in connection with loans or other similar transactions." *Williams v. United States,* 458 U.S. 279, 289-90, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982) (quoting H.R.Rep. No. 91-1556 at 35 (1970), U.S. Code Cong. & Admin. News at 5582).

The funds held by the bank in this case involved no extension of credit. Therefore, the statute is inapplicable, and the convictions based on this section ought to be reversed.

In all other respects, I join the judgment and opinion of the court.

APPENDIX C
159 F.3d 1020

7th Cir. reh'g en banc denied
January 26, 1999

UNITED STATES OF AMERICA,
Plaintiff-Appellee, Cross-Appellant,

v.

ROBERT R. KRILICH,
Defendant-Appellant, Cross-Appellee.

Nos. 97-2721, 97-2977

United States Court of Appeals,
Seventh Circuit

Decided January 26, 1999

JUDGES: Before Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

OPINION: Order

Defendant-appellant, cross-appellee filed a petition for rehearing and suggestion of rehearing en banc on November 10, 1998. A judge in active service called for a vote on suggestion of rehearing en banc,* but a majority of the active judges voted to reject the suggestion.** A majority of the judges on the panel have voted to deny rehearing.*** The petition for rehearing is therefore denied, and the suggestion for rehearing en banc is rejected.

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* Judge Flaum did not participate in the consideration of the suggestion for rehearing en banc.

** Judge Ripple and Judge Rovner voted to grant rehearing en banc.

*** Judge Ripple voted to grant rehearing.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 10, 1999

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 97-2721 & 97-2977 v.	
ROBERT R. KRILICH, *Defendant.*	No. 94 CR 419 John F. Grady, *Judge.*

Order

The Court reads "Defendant-Appellant's Motion to Recuse and Vacate Judgment" as implying a motion to recall the mandate. A mandate may be recalled only in extraordinary situations, see *Calderon v. Thompson,* 523 U.S. 538, 554 (1998), of which this is not one given the defendant's lengthy delay and Judge Easterbrook's contemporaneous decision that recusal is not required. The implied motion to recall the mandate therefore is denied.

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 26, 1999

Decided November 10, 1999

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 97-2721 & 97-2977 v.	
ROBERT R. KRILICH, SR., *Defendant.*	No. 94 CR 419 John F. Grady, *Judge.*

Order

Robert Krilich, whose conviction was affirmed more than a year ago, see *United States v. Krilich,* 159 F.3d 1020 (7th Cir. 1998), cert. denied, 68 U.S.L.W. 3222 (U.S. Oct. 4, 1999), has filed a motion asking me to recuse myself.

This motion must be denied for the most fundamental of reasons: there is no case pending in this court concerning Krilich. Our judgment was entered on October 27, 1998, and the mandate issued on February 3, 1999. Because there is no case pending here, there is nothing to recuse myself *from*. Krilich asks the panel to vacate its opinion and judgment, but this is impossible without recall of the mandate, a step that Krilich has not asked us to take, and that the panel today concludes would be inappropriate if sought.

Krilich appears to believe that Fed. R. Civ. P. 60(b) authorizes motions for recusal so long as they are filed within a year of final judgment. (Krilich's motion was filed 364 days after our opinion.) But Rule 60(b) concerns civil cases in the district court, while the matter at hand is a criminal case in the court of appeals. Nothing in the Federal Rules of Appellate Procedure creates a procedure parallel to Rule 60(b), and the powers of district judges in criminal cases are considerably more circumscribed. See Fed. R. Crim. P. 29(c) (time to enter judgment of acquittal limited to motion filed within seven days, or an extension of time granted during that week); Rule 33 (motion for new trial on any ground other than newly discovered evidence limited to same seven-day period); Rule 34 (motion for arrest of judgment limited to same seven-day period); Rule 35(c) (correction of sentence limited to same seven-day period). These time limits are not to be trifled with. See *United States v. Addonizio*, 442 U.S. 178 (1979); *Carlisle v. United States*, 517 U.S. 416 (1996).

Rule 33 establishes a longer two-year period for contentions based on newly discovered evidence. But Krilich does not and could not contend that the ground of his current motion (unlike the motions dealt with in *United States v. Cereda*, 172 F.3d 806 (11th Cir. 1998) (en banc)) is newly discovered. The basis of the motion is that Daniel R. Fischel testified for the United States as an economic expert witness during the sentencing proceedings. Professor Fischel and I have written articles and a book together; before my appointment to the bench in 1985 both of us were affiliated with Lexecon Inc., an economic consulting firm; Fischel is the Dean of the Law School at the University of Chicago, where I am a Senior Lecturer. That Professor Fischel testified for the United States is no mystery to Krilich. The other facts are of public record. Had Krilich's lawyers

deemed them important, they could have sought my recusal at any time after learning the panel's composition on April 7, 1998. For that matter, they could have filed a precautionary motion asking that I not be assigned to the panel. But they did nothing before our mandate issued.

What appears to have happened is that, after the case was remanded to the district court for resentencing, Krilich engaged new lawyers, who first learned about Professor Fischel's testimony when they read the transcript in preparation for resentencing. Evidence does not become "newly discovered," however, just because all evidence is novel to lawyers new to the case. All of the facts and circumstances that underlie the motion for recusal could have been brought to this court's attention back in 1997, when the appeal was taken. A motion filed at the end of 1999, long after the appellate proceedings have been concluded, is too late. See *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1060-61 (7th Cir. 1992) (Posner, J., in chambers).

To the extent Krilich's motion implies a request that I disqualify myself and thus justify a recall of the mandate, that request is denied not only as untimely but also on the merits, for reasons discussed below. Because any appeal after Krilich's resentencing may be assigned to the original panel, see Operating Procedure 6(b), it is possible to understand Krilich's motion as a request that I not participate in further proceedings. That implied request likewise is denied.

Krilich's principal contention is that 28 U.S.C. § 455(b)(2) requires my recusal, because it forbids a judge from sitting when "a lawyer with whom he previously practiced law . . . has been a material witness concerning" the controversy. There are three problems with this position: the statute applies only when the association in practice was contemporaneous with the development of the facts about which the lawyer gave testimony; I never "practiced law"

with Daniel Fischel; and he was not a "material witness" in the case. I start with the last of these.

Krilich does not understand the difference between a "witness" and a "material witness." A "material witness" is one who has unique, case-specific information. See *Black's Law Dictionary* 1597 (7th ed. 1999). See also 18 U.S.C. § 3144. A victim, an eyewitness, or an accused's confederate in crime may be deemed a material witness. Professor Fischel was none of these. He testified as an economic expert about the benefit (to the issuer) of being able to issue bonds whose interest is not taxed to the investors. Any other specialist in corporate finance and taxation could have provided the court with the same information.

Nor is Fischel a person with whom I "previously practiced law". Lexecon is not a law firm and renders no legal services. Krilich appears to acknowledge this. But he contends that "teaching and authoring articles for legal publications constitutes practicing law" (motion at 7). If this is so, then I have frequently committed the crime of unauthorized practice—for I am not licensed to practice law in Illinois yet have published many articles here, and others in California, Colorado, Connecticut, Indiana, Massachusetts, Michigan, Missouri, New York, Ohio, Texas and Virginia. (I belong to the District of Columbia Bar but not the bar of any of these states.) Many scholars who teach in law schools and publish articles in law reviews are not members of any bar; my co-authors over the years include William M. Landes, Gregg A. Jarrell, and Michael Barth, none of whom is licensed to practice law. The proposition that writing books and scholarly articles that do not purport to give legal advice to any particular person constitutes "practicing law" is untenable—and needless to say Krilich has not cited any case, from any jurisdiction, for the proposi-

tion that either teaching at a law school or scholarly publications are the practice of law.

Finally, § 455(b)(2) requires recusal only when the judge practiced law with the witness at the time the witness acquired the information. Here is the full text: "He shall also disqualify himself in the following circumstances: . . . Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it". The final phrase—"material witness *concerning it*" (emphasis added)—refers back to a "matter in controversy" that arose "during such association as a lawyer". In other words, if A and B practice law together, and during that association A acquires information that makes him a material witness in a case, then B cannot serve as a judge in that case. A's information is imputed to B by virtue of their law partnership, just as A's participation in the case as a lawyer would have been imputed to B. Section 455(b)(2) is not a perpetual bar on sitting in a case in which a former partner is counsel, and therefore it is not a perpetual bar on sitting on a case in which a former partner is a witness. Krilich committed his crime long after I became a judge, so § 455(b)(2) is irrelevant.

Krilich also relies on the catch-all rule that "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). See also Canon 3(C)(1) of the Code of Judicial Conduct. Krilich contends that my impartiality might reasonably be questioned because Fischel and I are co-authors, and because he is now Dean of a school at which I teach part-time.

United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985), following the approach of Advisory Opinion 11 of the Interim Advisory Committee on Judicial Activities, concluded that a judge's friendship with other participants in the case does not require disqualification in the absence of special circumstances—the Advisory Opinion suggested that a friendship so close that the other person has become "part of the judge's family" would require disqualification, and *Murphy* added that a joint vacation including the judge and a criminal prosecutor, immediately after the sentencing of the defendant, would call the judge's impartiality into question. Krilich does not contend that Fischel's testimony required disqualification under the approach of Advisory Opinion 11 and *Murphy*. Instead he believes that joint scholarly work between an expert witness and a judge automatically leads a well-informed, reasonable observer (which is the statutory standard, see *New York City Housing Development Corp. v. Hart,* 796 F.2d 976 (7th Cir. 1986)) to question the judge's impartiality.

If the witness' testimony concerned the subject of the joint scholarly endeavors, and the accuracy of that testimony were at issue in the litigation, then any challenge to the witness would appear to be a challenge to the judge's own views, which had been expressed jointly with the witness. But judges' views are contested all the time. Judges have expressed themselves in prior opinions, and a litigant's contention that the judge's decisions are incorrect does not require the judge to recuse himself. Likewise with views the judge may have expressed out of court. Judge Weinstein's extensive treatise on the law of evidence does not disqualify him from hearing cases in which litigants may contend that the conclusions expressed in that treatise are incorrect, nor did Judge Friendly's book *Federal Jurisdiction: A General View* (1973) disqualify him whenever the existence of

subject-matter jurisdiction was contested. See Canon 4A of the Code of Judicial Conduct. If a judge may sit in a case in which the judge's published views are *directly* challenged, there is no greater reason for disqualification when the challenge may be indirect, through a co-author.

As it happens, however, Professor Fischel's testimony in this case had nothing to do with any work we undertook jointly. Our joint work concerns the organization and legal regulation of corporations and their securities. See Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* (1991). Professor Fischel's testimony in this case concerned the valuation of tax-free bonds, a subject outside the scope of our scholarly endeavors. What is more, Prof. Fischel's conclusions were not contested (or even mentioned) on appeal. I did not learn that he had been a witness until late in the preparation of the opinion, when a law clerk checking the transcript mentioned that he had testified. The parties' appellate briefs did not mention either Professor Fischel's name or the conclusions he reached; the cross-appeals were directed to other issues.

Matters would be different if Krilich had contended on appeal that Fischel was not a credible witness. Because I know Daniel Fischel well—and obviously think highly of him, or I would not have collaborated with him on scholarly projects—a reasonable observer might conclude that I would have preconceptions about his veracity. For this reason I have recused myself from one case in which a party challenged the accuracy of Fischel's testimony and another in which Fischel was a plaintiff. But only a per se rule that no judge who has written a scholarly publication with a witness ever may sit on the case would support disqualification in Krilich's case. Such a per se rule has no support.

At last, I must give some attention to Krilich's argument that I must recuse myself because Dean Fischel sets

the salary I receive as a Senior Lecturer. The argument is that an observer might believe that I would take Fischel's side to avoid any risk that he would reduce my salary. That is a feeble argument when, as here, the testimony was not at issue on appeal, and I could therefore neither endorse nor oppose the position the witness espoused. But it is also anachronistic, for at the time of the appeal Fischel was not Dean. When Krilich's appeal was briefed, argued, and decided, Douglas G. Baird was Dean of the Law School. Fischel did not become dean until January 1, 1999.

If Dean Fischel should testify in the resentencing proceedings, and if that testimony should be at issue on appeal, then I would recuse myself to avoid any impression that my financial interests could be affected. (My salary as a teacher is effectively set by Congress, see 5 U.S.C. App. 7 §501(a)(1), rather than by the Dean; but an objectively reasonable observer might not understand this because the details are not public knowledge.) Otherwise, however, I will participate in the case.

APPENDIX F

AFFIDAVIT OF PHILIP W. SANDLER

Philip W. Sandler states as follows:

1. I am counsel for Robert R. Krilich, Sr. (Petitioner). Generally speaking, I concentrate in taxation. I am only indirectly involved in Petitioner's criminal case. Until the Motion to Disqualify was filed, I had not entered any appearance in Petitioner's criminal case.

2. Petitioner was convicted in the district court of conspiracy to violate the Racketeer Influenced and Corrupt Organization statute, 18 U.S.C. §1962(d), and fraud, 18 U.S.C. §1014. The district court held extensive sentencing hearings, in which one of the central issues was the value of the net benefit received by Petitioner as a result of his unlawful conduct. The government presented Daniel R. Fischel (Fischel) as its expert witness on this issue. Fischel, who testified on July 11, 1998, and August 20, 1998, is currently a Professor of Law at and Dean of the University of Chicago Law School and is also Executive Vice President of Lexecon, Inc. (Lexecon). Subsequent to Fischel's testimony, the district court found that net the benefit to Petitioner was between five and ten million dollars. The court used that figure to impose a 14 level increase in Petitioner's offense level, and then used the resulting level as the starting point for a downward departure.

3. In this matter, I became aware of the potential conflict between Judge Easterbrook and Fischel only when preparation for the Petitioner's resentencing commenced. I reviewed the Petitioner's sentencing transcripts in order to determine how the Petitioner's net benefit was previously calculated by the government and, ultimately, by the court. The sentencing transcripts contained the testimony of the

government's expert witness Fischel, whereupon I learned of Fischel's connection to Lexecon. I was already aware that Fischel was the Dean of the University of Chicago Law School.

4. On or about June 21, 1999, I called a professional colleague, attorney John M. Beal (Beal), in order to discuss certain district court procedural issues relating to the Petitioner's case. Coincidentally, Beal, was a graduate of the University of Chicago Law School, and knew of Fischel and Lexecon. During the course of the phone conversation, although unrelated to the original purpose of the call, Beal inquired as to who was on the appellate panel. When Beal was informed that one of its members was Judge Easterbrook, he advised me that Judge Easterbrook was one of the principal founders of Lexecon. At that point, a connection was made by the attorneys between Judge Easterbrook, Fischel, and Lexecon.

5. Although I was only indirectly involved in the Petitioner's criminal case, I thought it worthwhile to pursue this issue. On or about September 1, 1999, upon my advice, the Petitioner retained Beal to work along with me in order to determine whether there was a basis for seeking the recusal of Judge Easterbrook and obtaining a new appellate hearing. Being extremely conscious of the importance of not making unwarranted allegations with respect to an appellate court judge, we promptly undertook a careful and extensive investigation of the facts relevant to this issue.

6. This motion to disqualify him was drafted and filed as expeditiously as possible. Additionally, it was filed in order to come within the Rule 60(b)(2) constraint of one year from date of judgment.

Further affiant sayeth not.

_____

PHILIP W. SANDLER

Subscribed and sworn to before me
this day of April, 2000.

_____

Notary Public

APPENDIX G

1. **The Economic Structure of Corporate Law**
   Frank H. Easterbrook, Daniel R. Fischel/Paperback/
   Date Published: April 1996
2. **The Economic Structure of Corporate Law**
   Frank H. Easterbrook, Daniel R. Fischel/Hardcover/
   Date Published: January 1994

Printed from
Barnes/Noble
bn.com

APPENDIX H

Curriculum Vitae

Easterbrook, Hon. Frank H.

Judiciary

Court:	US Court of Appeals 7th Circuit
Judge:	Easterbrook, Frank H. Hon.
Position:	Circuit Judge Since: 1985
First Appointed to this Court:	1985 By: President Reagan
City:	Chicago
County:	Cook
State:	Illinois
Chambers Address:	Judge US Ct of Appeals, US Courthouse, 219 S Dearborn St, Chicago, IL 60604-1702
Country:	U.S.A.
Phone:	(312) 435-5808
Education:	University of Chicago Law School, Chicago, Illinois, J.D., Doctor of Jurisprudence, 1973, Cum Laude
	Honors & Awards: Order of the Coif
	Law Review: Topics and Comment Editor, University of Chicago Law Review
	Swarthmore College, Swarthmore, Pennsylvania, B.A., Bachelor of Arts, 1970
Born:	September 3, 1948, Buffalo, New York, U.S.A.
Past Positions:	Judge Levin H. Campbell, United States Court of Appeals, First Circuit, Law Clerk, 1973-1974
	Office of the Solicitor General, Department of Justice, Assistant to the Solicitor General, 1974-1977

Easterbrook, Hon. Frank H.

Office of the Solicitor General, Department of Justice, Deputy Solicitor General, 1978-1979

Lexecon, Inc., Principal Economic Consultant, 1980-1985

Securities and Exchange Commission Advisory Committee on Tender Offers, Member, 1983

Honors & Awards:

Department of Justice, Special Commendation for Outstanding Service, 1979

Emory University, Distinguished Scholarship in Law and Economics Award, 1981

Mont Pelerin Society Fellow, 1982

Named one of the Ten Outstanding Young Citizens of Chicago, Chicago Junior Association of Commerce and Industry, 1983

D. Francis Bustin Prize, 1985

Jerome N. Frank Prize, for Best Student Writing, University of Chicago Law Review, 1973

Named One of Ten Outstanding Young Citizens of Chicago, Chicago Jaycees, 1981

Special Award, Outstanding Contributions in the Field of Law and Economics, George Mason University Student Bar Association, 1992

Classes/Seminars/ Presentations/CLE Taught or Instructed:

Assistant Professor of Law, University of Chicago Law School, 1979-1985

Professor of Law, University of Chicago Law School, 1981-1984

Lee & Brena Professor of Law, University of Chicago Law School, 1984-1985

Senior Lecturer, University of Chicago, 1985-Present Antitrust Law, Civil Procedure, Constitutional Law, Corporate Law

Easterbrook, Hon. Frank H.

Criminal Procedure, Interpretation, Judicial Process, Regulated Industries, Securities, United States Supreme Court

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Easterbrook, Hon. Frank H.

and Extent of Interpretation 17, National Legal Center for the Public Interest 1990

The Corporate Contract (Co-Author: Daniel R. Fischel), reprinted in Corporate Law and Economic Analysis 182-215, Cambridge University Press (Editor: Lucian Arye Bebchuk, 1990), Foundations of Corporate Law, Oxford University Press (Editor: Roberta Romano, 1993)

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Mandatory Disclosure and the Protection of Investors, 70 Virginia Law Review 669 (Co-Author: Daniel R. Fischel), 1984

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Easterbrook, Hon. Frank H.

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Affiliations:

American Bar Association

American Legal Institute

American Economic Association

American Law Institute

Easterbrook, Hon. Frank H.

Federal Bar Association

Association of American Law Schools

District of Columbia Bar

Mont Pelerin Society

James Madison Memorial Fellowship Foundation

Judicial Conference of the United States

SEC Advisory Committee on Tender Offers

American Academy of Arts and Sciences

DANIEL R. FISCHEL

May, 1996

Business Addresses: Lexecon Inc.
332 South Michigan Avenue
Chicago, IL 60604
312/322-0209

University of Chicago
Law School
1111 East 60th Street
Chicago, IL 60637
312/702-9610

PROFESSIONAL EXPERIENCE

Lee and Brena Freeman Professor of Law, University of Chicago Law School (7/1/89—present); Professor of Law, University of Chicago Law School (1/1/84—present); Visiting Professor of Law, University of Chicago Law School (7/1/82—6/30/83).

Professor of Law and Business, University of Chicago Graduate School of Business (7/1/87—6/30/90).

Director, Law and Economics Program, University of Chicago (1/1/84—6/30/91).

Assistant Professor of Law, Northwestern University School of Law (6/80—6/81); Associate Professor of Law, Northwestern University School of Law (6/81—6/82); promoted to full professor in 6/82.

Attorney with Levy and Erens, Chicago, Illinois (7/79—6/80).

Law Clerk for Associate Justice Potter Stewart of the United States Supreme Court (1978—1979).

Law Clerk for Judge Thomas E. Fairchild, Chief Judge of the Seventh Circuit Court of Appeals (1977—1978).

CONSULTING EXPERIENCE

Executive Vice President, Lexecon Inc.

AREAS OF SPECIALIZATION

Corporate Finance, Corporate Control Transactions, Corporations, Regulation of Financial Markets, Regulation of Investments, Economic Analysis of Law.

PUBLICATIONS

Payback: The Conspiracy to Destroy Michael Milken and His Financial Revolution, Harper Business (1995).

The Economic Structure of Corporate Law, Harvard University Press (1991) (with Frank H. Easterbrook).

ARTICLES

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The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981) (with Frank H. Easterbrook) (awarded prize by Emory University for best paper written in law and economics for the year 1981).

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Comment, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. Chi. L. Rev. 338 (1976).

EDUCATION

University of Chicago Law School, Chicago, Illinois; J.D. 1977, cum laude; Order of the Coif; Comment Editor, Vol. 44, *University of Chicago Law Review*; Approximately top 1% of the Class. Awarded Casper Platt Award for best paper written by a student of the University of Chicago Law School; awarded Jerome N. Frank Prize for excellence in legal writing while a member of the University of Chicago Law Review, 1974-1977. Studied law and economics with Richard Posner and other members of the faculty.

Brown University, Providence, Rhode Island; M.A. 1974 in American History.

Cornell University, Ithaca, New York; major—American History; minor—Economics; B.A. 1972.

APPENDIX I

A new dean has been named by the University of Chicago Law School from among the leading law and economics experts on its own faculty.

The appointment of Daniel R. Fischel to the post was announced Friday by the university, and will become effective on July 1, 1999, when the current dean, Douglas G. Baird steps down.

Baird had previously announced his intention not to seek reappointment after his five-year term ended, so that he could focus more fully on his legal scholarship and classroom teaching.

Fischel is currently the Lee and Brena Freeman Professor at the law school, and chaired its appointments committee this year. During that time, the law school signed on eight academic stars as new faculty members in what Baird has described as perhaps the best hiring year ever for any law school.

Fischel also is a principal in Lexecon Inc., a prominent law and economics consulting firm formed in 1977 by two U of C law professors, and currently is working with the Department of Justice on several major issues. The firm is widely recognized for its work on antitrust and regulatory matters, and helps determine damages as well in product liability, employment discrimination and intellectual property cases.

Fischel, who said he found out about the appointment Wednesday, has as his main administrative focus at this point organizing the capital campaign associated with the law school's centennial in 2002.

"I think the major plan that I have, apart from continuing in the tradition of excellence and building on the

accomplishments, which are very substantial, of Dean Baird's administration, is to have a successful centennial capital campaign," he said.

Although the campaign probably won't officially kick off until he assumes the dean's post next summer, Fischel said, he expects to begin planning it now, along with Baird.

Known for his pioneering economic analysis of corporate law issues such as hostile takeovers, securities fraud and corporate crime, Fischel is both a legal and business scholar. He formerly was a professor of law and business at the university's Graduate School of Business, and co-authored "The Economic Structure of Corporate Law" with Judge Frank H. Easterbrook of the 7th U.S. Circuit Court of Appeals.

The book has become a classic reference work on economic analysis of business issues.

Fischel received his J.D. from the U of C in 1977, where he was elected to the Order of the Coif, and clerked for U.S. Supreme Court Justice Potter Stewart. A faculty member at the law school for 15 years, he presently teaches courses on corporations and corporate finance.

Chicago Daily Law Bulletin article
Dated: August 14, 1998

APPENDIX J

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 1998

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Easterbrook, Frank H.	Seventh Circuit	5/6/99
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge (Active)	**5. Report Type (check appropriate type)** ☐ Nomination, Date _____ ☐ Initial ☒ Annual ☐ Final	**6. Reporting Period** 1/1/98 to 12/31/98
7. Chambers or Office Address 219 South Dearborn Street Chicago, Illinois 60604	**8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.** Reviewing Officer _____ Date _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.		

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
☐ NONE (No reportable positions.)	
1. Senior Lecturer	University of Chicago

II. AGREEMENTS.

☒ NONE (No reportable agreements.)

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
☐ NONE (No reportable non-investment income.)		
1.	University of Chicago — salary (see Part VIII No. 1)	$25,000.01
2.	West Group — royalty	$ 1,194.17

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Easterbrook, Frank H.	5/6/99

IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements received by spouse and dependent children, respectively. See pp. 25-28 of Instructions.)

SOURCE	DESCRIPTION

☐ NONE (No such reportable reimbursements.)

1. Separate sheet attached

V. GIFTS.

☒ NONE (No such reportable gifts.)

VI. LIABILITIES.

☒ NONE (No reportable liabilities.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Easterbrook, Frank H.	5/6/99

IV. REIMBURSEMENTS.

Union League Club of Chicago*	Signing privileges—uncertain value
Federalist Society Washington, D.C.	Travel reimbursement 10-17 to 10-19-97
Yale Law School New Haven, Connecticut	Travel reimbursement 12-12 to 12-13-97
George Washington University Washington, D.C.	Travel reimbursement 2-12 to 2-14
Federalist Society New York, New York	Travel reimbursement 3-6 to 3-8
American Bankruptcy Institute New York, New York	Travel reimbursement 3-16 to 3-17
Institute for Law & Economic Policy Tucson, Arizona	Travel reimbursement 4-16 to 4-18
New York University Florence, Italy	Travel reimbursement 6-24 to 6-28
Zurich Technical Institute Paris, France	Travel reimbursement 9-16 to 9-20
Federalist Society Washington, D.C.	Travel reimbursement 11-13 to 11-15

Note: Travel reimbursements of judicial business and other governmental reimbursements also omitted.

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* The Union League Club extends to federal judges the privilege of eating at the Club without formal membership. Since July 1993 it has charged $20 per month for these privileges; the difference between this and the market value is a gift, but whether there is any difference and, if so, its size, is difficult to determine. Judges pay the same for meals as do regular members of the Club.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Easterbrook, Frank H.	5/6/99

VII. Page 1 INVESTMENTS and TRUSTS—income, value, transactions

(includes those of spouse and dependent children. See pp. 36-54 of Instructions)

A. Description of Assets (including trust assets) *Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure*	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period
	(1) Amt. Code 1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code 2 (J-P)	(2) Value Code 3 (Q-W)	

☐ **NONE** (No reportable income, assets, or transactions.)

1 Vanguard Index Trust (mutual fund)	Cap. Gain				
	D	+ Div.	O	T	See Part VIII
2 Vanguard Money Market Trust (mutual fund)	D	Div.	K	T	See Part VIII
3 Vanguard Municipal Bond Fund	Cap. Gain				
	E	+ Div.	O	T	See Part VIII
4 Vanguard Retirement Portfolio (mutual fund; blocked access)	Cap. Gain				
	D	+ Div.	N	T	See Part VIII
5 First National Bank of Chicago (checking account)	B	Int.	K	T	

Income/Gain Codes: (See Col. B1, D4)

A = $ 1,000 or less
B = $ 1,001-$ 2,500
C = $ 2,501-$ 5,000
D = $ 5,001-$15,000
E = $15,001-$50,000

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Easterbrook, Frank H.	5/6/99

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

Separate sheet attached

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature /s/ FRANK H. EASTERBROOK Date 5/6/99

NOTE: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, § 104.)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Easterbrook, Frank H.	5/6/99

VIII. ADDITIONAL INFORMATION or EXPLANATIONS.

1. (Part III): I have received the approval of the Chief Judge to teach at the University of Chicago. This income therefore is "outside earned income" rather than an "honorarium" within the meaning of the Ethics Reform Act of 1989. I accepted gross income exceeding the statutory cap (15% of Level II of the Executive Schedule) because, under § 3(b) of the regulations of the Judicial Conference implementing this statute, "outside earned income" includes only net taxable income, and therefore excludes pension contributions as well as the "ordinary and necessary expenses paid or incurred in producing this income." Some of the income reported in Part III was contributed to a pension plan through the University of Chicago as part of a salary reduction plan and therefore does not count for statutory purposes. Moreover, the ordinary and necessary expenses of producing the income—including the cost of commuting between the courthouse and the Law School, fees for parking at the University, and the expenses of equipment and books for my Law School office—are substantial. Net taxable income is less than the statutory maximum.

2. (Part VII): Dividends and capital gain distributions from the mutual funds marked "See Part VIII" are reinvested automatically monthly. Additional purchases of shares in the Index Trust (value code K) and the Municipal Bond Fund (value code K) were made during 1998. No shares of any fund (other than the money market fund, which I treat as a checking account) were sold or exchanged during 1998.

3. (Part VII): While I was employed full-time by the University of Chicago preceding my appointment to the court, and again since 1992, pension contributions under a defined contribution plan were made on my behalf. TIAA-CREF holds the funds contributed before 1983 (value code M). Pension contributions since 1983, and supplemental retirement annuity contributions since 1982, are held by the Vanguard Group, which also holds pension contributions made on my behalf during 1981-84 by Lexecon Inc., plus IRA contributions during that period. "Vanguard Retirement Portfolio" is an umbrella designation for these assets. Access to all funds in the Vanguard Retirement Portfolio is blocked until I reach retirement age. Vanguard invests these monies in four of its funds: Vanguard Money Market Reserves Prime Portfolio; Vanguard Fixed Income Securities Fund Long-Term Corporate; Vanguard Fixed Income Securities Fund High-Yield Corporate; and Vanguard International Value Portfolio (formerly called the Trustees' International Portfolio). Investments within the Vanguard Retirement Portfolio may change from time to time, but only from one mutual fund to another (never to stock in an individual firm), making a consolidated listing desirable.

APPENDIX K
178 F.3d 859

UNITED STATES of America, Plaintiff-Appellant,

v.

Robert R. KRILICH, Defendant-Appellee.

No. 99-1980.

United States Court of Appeals,
Seventh Circuit.

Submitted April 29, 1999.

Decided May 11, 1999.
As Amended on Denial of Rehearing
June 1, 1999.

Following affirmance of fraud and other convictions and remand for resentencing, 159 F.3d 1020, the United States District Court for the Northern District of Illinois, John F. Grady, J., ordered defendant released on bail pending completion of anticipated certiorari proceeding before the Supreme Court, and the United States appealed. The Court of Appeals held that: (1) statutory requirements for release while seeking certiorari, rather than those for release while awaiting sentence applied; (2) under former requirements, defendant was not entitled to release; and (3) in any event, release which might continue for over a year was error.

Reversed.

Stephen Heinze (submitted), Office of the United States Attorney, Criminal Division, Chicago, IL, for Plaintiff-Appellant.

Lawrence C. Marshall, Northwestern University Legal Clinic, Chicago, IL, John A. Briley, Washington, DC, for Defendant-Appellee.

Before EASTERBROOK, RIPPLE, and EVANS, Circuit Judges.

PER CURIAM.

[1] Robert Krilich is serving a term of 64 months' imprisonment. He entered prison on October 31, 1997, and with good behavior will be released in spring 2002. 18 U.S.C. § 3624(b)(1). We affirmed his conviction, see United States v. Krilich, 159 F.3d 1020 (7th Cir. 1998), but remanded for resentencing after concluding that the district court's application of the Sentencing Guidelines was unduly favorable to Krilich. Id. at 1029-31. Krilich plans to file a petition for certiorari, and because there is a conflict among the circuits about the convictions for fraud under 18 U.S.C. §1014 (see 159 F.3d at 1027-29. 1031-32), the Supreme Court may be willing to hear the case. But Krilich has been convicted on other counts too, and because all of his convictions have been affirmed, he cannot satisfy the requirements of 18 U.S.C. § 3143(b) for release while seeking certiorari; that the case present "a substantial question of law or fact likely to result" in outright reversal or "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process."

[2] When issuing the opinion resolving Krilich's appeal, we also denied has motion for release on bail. Notwithstanding our decision, the district judge issued an order admitting Krilich to bail until has resentencing—and the judge deferred resentencing until the conclusion of proceedings in the Supreme Court. Applying 18 U.S.C. § 3143(a), under which clear and convincing evidence that the person is unlikely to flee (or pose a danger to the community) requires release until sentence has been pronounced, the judge found Krilich entitled to freedom in the interim.

United States v. Holzer, 848 F.2d 822 (7th Cir. 1988), holds that § 3143(b) supplies the standards for release after the court of appeals has affirmed the conviction, and Krilich cannot satisfy the criteria of that *861 subsection. Nonetheless, relying on United States v. Pfeiffer, 886 F.Supp. 303 (E.D.N.Y. 1995), a decision that criticized Holzer as unfaithful to the statutory text, see 886 F.Supp. at 304, the district judge wrote: "We agree with Judge Weinstein's reasoning [in Pfeiffer] that a person in Krilich's position is a person who has not been sentenced. We conclude, therefore, that § 3143(a) applies." A single judge of this court issued a stay of the release order pending resolution of the prosecutor's appeal.

[3] In Holzer, as here, convictions sufficient to support continued incarceration were affirmed but the ease was remanded for adjustment of the time yet to be served. Holzer prevailed on one issue, and this court ordered resentencing with the expectation that Holzer would receive a modest reduction in the total sentence. But we held that he was not to be released under § 3143(a) in the interim. Section 3143(a) applies to a person "who is awaiting imposition or execution of sentence". Section 3143(b) governs "a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari". Holzer dealt with the proper classification of a person who meets both of these descriptions: he has been sentenced, has filed an appeal (and perhaps a petition for certiorari), and is awaiting imposition of a new sentence. We concluded that § 3143(a) "has reference to the situation where a defendant is awaiting sentencing the first time". 848 F.2d at 824. That is the law of this circuit, and the district judge was obligated to follow Holzer rather than a contrary decision of a district judge elsewhere. The facts of Holzer and this case differ, but

this difference does not call our legal conclusion into question. Quite the contrary, the remand in Holzer was likely to lead to a reduction in the sentence, and the remand here to an increase. If § 3143(a) did not apply to Holzer, it certainly does not apply to Krilich.

Pfeiffer does not persuade us to abandon Holzer. The district judge in Pfeiffer stressed that § 3143(a) deals with "a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence", which includes persons awaiting sentencing on remand. True enough. It is equally accurate to say that a person in Holzer's or Krilich's position comes within subsection (b). Krilich wants review by writ of certiorari, and § 3143(b) speaks directly to his situation. Morison v. United States, 486 U.S. 1306, 108 S.Ct. 1837, 100 L.Ed.2d 594 (1988) (Rehnquist, C.J., in chambers). Most if not all of the time Krilich spends on release (if the district judge's order is affirmed) will pass while the case is before the Supreme Court, rather than while Krilich is "awaiting imposition...of sentence" in the district court.

Section 3143 does not specify what happens when both subsections read on the situation. Application of both at once is impossible; they prescribe different standards. How is the tie to be broken? The different functions of the different rules enable a court to choose. "The reason for not imprisoning a convicted defendant (unless he is likely to flee or is a public menace) before he is sentenced is that the sentence may not be a sentence of imprisonment, or may be a sentence for a shorter period of imprisonment than the interval between conviction and sentencing: or that the defendant needs some time to get his affairs in order....The reason has no application to a case where the defendant's conviction....has been upheld and a sentence....remanded solely to give the judge a chance to consider a possible,

though doubtless modest, reduction because the court of appeals has vacated a concurrent sentence." Holzer, 848 F.2d at 824. Likewise when the remand comes with instructions that are apt to augment the punishment.

We cannot imagine any reason why a person whose convictions have been affirmed, and who faces at least another *862 three years in prison, should be released while the district judge decides whether (and, if so, by how much) to increase the time remaining to be served. Breaking a sentence in the middle does not promote any end other than reducing the effective penalty by allowing a holiday, worse, providing an opportunity to escape. The district court's assertion that "[t]here has been no material change since" the time Krilich was released on bail before his original sentencing disregards the fact that the convictions have been affirmed, and Krilich not only faces a greater probability of continued confinement but also should anticipate a longer term. Both of these changes make absconding more attractive, especially for someone of substantial wealth who has stashed assets in foreign nations, as Krilich has done. When releasing Krilich, the district judge did not mention the prosecutor's contention that Krilich has violated orders regulating the disposition of his assets and thus displayed what could be understood as financial preparations for flight.

(4) Holzer had a second holding. We stated that even if § 3143(a) does apply following a remand for resentencing, a district court may not release the defendant for an indefinite period. Release under § 3143(a) is supposed to be brief. Just as in Holzer, the district judge has announced that he will not resentence the defendant until the Supreme Court has acted. Because Krilich has not yet filed a petition for certiorari, the Court's decision to grant or deny review probably will not come until next fall. If the Court elects to address the conflict among the circuits concerning the bank

fraud statute, then resolution may be postponed until spring 2000, more than a year in the future (and 1 1/2 years from our decision). The district court's order may enable Krilich to remain at liberty a long time, although convictions other than bank fraud suffice to detain him. We said in Holzer that in such a case, even if § 3143(a) supplies the rule of decision, a judge would abuse his discretion by waiting more than 60 days to carry out the resentencing and return the defendant to prison. 848 F.2d at 824-25. By ignoring the alternative holding of Holzer, the district court committed a further error.

Krilich must remain in prison while awaiting decision by the Supreme Court and the imposition of a new sentence on remand. The order of the district court admitting Krilich to bail is reversed. Circuit Rule 36 will govern further proceedings in the district court.